

2014 WL 7002543 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)  
Superior Court of California.  
Ventura County

Carmen Evelyn FICO,

v.

Laura Ann HICKS.

No. 56201300438082.  
June 16, 2014.

**Plaintiff Carmen Evelyn Fico's Memorandum of Points and Authorities in Support of  
Opposition to Defendant Arik Avaneszadehs' Demurrer to Her Third Amended Complaint**

[Ian J. Imrich](#) (State Bar No. 147010), Law Offices of Ian J. Imrich, A Professional Corporation, 10866 Wilshire Boulevard, Suite 1240, Los Angeles, California 90024, 310.481.2258 (Voice), 310.481.4475 (Fax), [ian@ijilaw.com](mailto:ian@ijilaw.com), for plaintiff, Carmen Evelyn Fico, an individual.

Hon. [Tari L. Cody](#).

Plaintiff CARMEN EVELYN FICO hereby and respectfully submits the following Memorandum of Points and Authorities in support of her opposition to the demurrer filed by defendant ARIK AVANESZADEH (sometimes hereinafter collectively referred to as “Mr. Avaneszadeh” or “Defendant”) unsuccessfully and improperly attacking the 13<sup>th</sup> Cause of Action for **Elder Abuse** as alleged within her currently operative pleadings on file herein.

## **I. INTRODUCTION**

Plaintiff CARMEN EVELYN FICO filed her Third Amended Complaint (“3AC”) on April 9, 2014.

## **II. THIS MATTER IS PRIMARILY A “FINANCIAL ABUSE” CASE ARISING UNDER COMMON LAW FRAUD AND CALIFORNIA STATUTORY ELDER ABUSE LAWS, AND THOSE RECENT SUBSTANTIVE AND REMEDIAL AMENDMENTS THERETO AS-SET FORTH IN THE WELFARE AND INSTITUTIONS CODE AND AS PROPERLY IS ALLEGED WITHIN PLAINTIFF FICO'S COMPLAINT.**

The gravamen of Plaintiff FICO's instant action arises out of the HICKS defendants' fraud and deceit and is fundamentally based upon Statutory **Financial Abuse**, as the law was significantly amended in 2008, in order to address, inter alia, the sort of **Elder Abuse** that is alleged herein. See, [Welf. & Inst.C. § 15610.30\(a\)](#) broadly defining “**financial abuse**” of **elders**, and [Welf. & Inst.C. § 15610.30\(b\)](#) and establishing a “conclusive presumption” of **financial abuse** where facts alleged by an **elder** plaintiff, as is the case here, establish harm to property or person. *Id.* [Welf. & Inst.C. § 15610.30\(b\)](#) specifically provides that a person or entity “shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity... knew or should have known that this conduct is likely to be harmful to the **elder** or dependent adult” (emphasis added).

For the living **elder** victims of **financial abuse** (as opposed to those who have deceased and the **abuse** is discovered after that time), the remedies specifically provided in **financial abuse** cases are compensatory damages, attorney fees unilaterally

to the plaintiff, and reimbursement for other expenses and costs incurred by the plaintiff litigant. *Sanders v. Lawson* (2008) 164 CA4<sup>th</sup> 434, 438-439, 78.

The Statutory **Financial Abuse** codes are not limited to entities (such as hospitals, skilled nursing facilities, or professional caretakers) but encompass and actually focus in large part directly upon any “persons” - including, but not limited to, accountants, lawyers, bankers, insurance brokers, annuity salespersons, real estate agents, loan officers, and also includes in particular, those family members, co-habitants, and any other individuals -- who deprive an **elderly** person of any real or pecuniary personal property rights as has been alleged in the instant action. See, *Welf. & Inst.C. § 15610.30(a)* expressing the broad statutory definition of “**financial abuse**” that occurs when any “person” or entity does any of the following: “takes, secretes, appropriates, obtains or retains, any interest in real or personal property, for a wrongful use, or with intent to defraud or both.”

For example, in *Wood v. Jamison* (2008) 167 CA4<sup>th</sup> 156, 164-165 the court clearly explained that an **elder's** lawyer, who referred the **elder** to a mortgage broker and received a \$4,000 “finder's fee” in doing so, had taken property belonging to the **elder** and hence was liable to the client for statutory **financial abuse** of his **elder** client. In addition, the lawyer was liable for aiding and abetting an **abusive** scheme to take money from an **elder**. That lawyer was not a “caregiver” but was found liable for **financial abuse** of an **elderly** person based on an excessive finder's fee. See also, *Bonfigli v. Strachan* (2011) 192 CA4<sup>th</sup> 1302, 1316 (explaining that the use of an invalid power of attorney to effect a lot line adjustment and encumber the property of an **elder** was **financial abuse** under the statute.)

Accordingly, a viable cause of action for **financial abuse** of an **elder** is stated when the broad statutory provisions are met as FICO has alleged in the instant action. *Das v. Bank of America, N.A.* (2010) 186 CA4<sup>th</sup> 727, (citing text) and *Welf. & Inst.C. § 15657.6*. Throughout her detailed complaint, Plaintiff FICO specifically and sufficiently alleges all those factual elements necessary to constitute a claim for relief for Statutory **Financial Abuse** by the defendant ARIK AVANESZADEH under California law, as amended in 2008. First, the allegations made in the 3AC detail direct liability of Mr. Avaneszdeh as one who “knew or should have known” that the proceeds he received from the sale of the Maynard Property were part and parcel of the HICK's fraud; and secondly, the 3AC alternatively alleges that Mr. Avaneszadeh was aiding and abetting (i.e., conspired with and thus vicariously liable for) the actions of the HICKS and other co-conspirator defendants. That is all that is required herein. Plaintiff is not required to prove her allegations at this juncture.

Simply put, how an **elder** plaintiff such as FICO discovered the key facts underlying her causes of action herein does not mean they are not legally viable. Under applicable California law, she has alleged all that is required within her pleadings of her cause of action for relief, including that alleged pursuant to *Welf. & Inst.C. § 15610.30(a)*. She has also pled the remedial aspects of the law in accordance with *Welf. & Inst.C. § 15657.5*.

**III. DEFENDANTS' DEMURRER SHOULD BE OVERRULED BECAUSE THE COMPLAINT STATES SUFFICIENT FACTS ENTITLING PLAINTIFF FICO TO RELIEF OF HER LEGALLY VIABLE **ELDER ABUSE** CAUSE OF ACTION. SHE IS NOT REQUIRED TO PROVE HER FACTUAL ALLEGATIONS AT THIS JUNCTURE.**

A demurrer lies from defects on the fact of the pleading or from facts that the court may judicially notice. *Stevens v. Superior Court*, 75 Cal. App. 4<sup>th</sup> 594, 601, (1999), as modified (Oct. 7, 1999) and as modified, (Oct. 18, 1999). The complaint will be liberally construed with a view to substantial justice between the parties. As such, the complaint must be given a reasonable interpretation, reading it as a whole, and with the parts in their context. *CrossTalk Productions, Inc. v. Jacobson*, 65 Cal. App. 4<sup>th</sup> 631, 635 (1999).

In testing the sufficiency of a complaint as against a general demurrer, the Court should construe the allegations, as well as reasonable inferences raised therein, as admitted. [Del E. Webb Corp. v. Structural Materials Co.](#), 123 Cal. App. 3d 593, 604, 176 Cal. Rptr. 824 (2d Dist. 1981). The Court will also view the pleading with a liberal construction so as to affect substantial justice between the parties. Thus, if the complaint states facts constituting a cause of action entitling plaintiff to any relief on any viable legal theory, the demurrer will be overruled. [Addiego v. Hill](#), 238 Cal. App. 2d 842, 845, 48 Cal. Rptr. 240 (1<sup>st</sup> Dist. 1965).

And, of course, it is axiomatic that a demurrer is “simply not the appropriate procedure for determining the truth of disputed facts,...” [Cruz v. County of Los Angeles](#), 173 Cal. App. 3d 1131, 1134 (1985), citing from [Ramsden v. Western Union](#), 71 Cal. App. 3d 873, 879 (1997).

#### **IV. DEFENDANTS' DEMURRER SHOULD BE OVERRULED BECAUSE PURPORTED FACTS OUTSIDE THE CURRENT PLEADINGS ARE NOT PROPER.**

Courts are indeed permitted to take judicial notice -- but not of hearsay allegations or extrinsic facts improperly presented in a demurrer. There is a distinction between recognizing the existence of such matters as opposed to the truth asserted therein. [Ramsden v. Western Union](#), 71 Cal. App. 3d 873, 879, 138 Cal. Rptr. 426 (2d Dist. 1997). “It is an elementary rule that the sole function of a demurrer is to test the sufficiency of the challenged proceeding. It cannot, properly, be addressed to or be based upon evidence or other extrinsic matters.” [Childs v. State of California](#), 144 Cal. App. 3d 155, 163, 192 Cal. Rptr. 526 (1<sup>st</sup> Dist. 1983), citing from [Cravens v. Coghlan](#), 154 Cal. App. 2d 215, 217, 315 P.2d 910 (1<sup>st</sup> Dist. 1957).

#### **V. DEFENDANTS' DEMURRER SHOULD BE OVERRULED BECAUSE PURPORTED “UNCERTAINTY” IN THE COMPLAINT IS LACKING.**

Plaintiff FICO is not required to prove her claims, contentions, and assertions under the guise of remedying purported pleading ambiguities and “uncertainties” the defense has so haphazardly raised. In that regard, see, e.g., [Khoury v. Maly's of California, Inc.](#) (1993) 14 Cal. App. 4<sup>th</sup> 612, 616 (Demurrers for uncertainty are disfavored and will be overruled when proper claims are made.) See [Williams v. Beachnut Nutrition Corp.](#) (1986) 185 Cal App 3d 135, 139.

#### **VI. CONCLUSION.**

Based on all of the foregoing arguments, analyses, and discussion, Plaintiff FICO respectfully submits that this Honorable Court cannot sustain a demurrer to the **Elder Abuse** cause of action properly plead as to defendant ARIK AVANESZADEH within her currently operative 3AC on file herein.

First, defendant ARIK AVANESZADEH is directly liable to Plaintiff FICO under the **Elder Abuse** laws of the State of California.

Second, defendant ARIK AVANESZADEH is vicariously liable to Plaintiff FICO as outlined in the conspiracy portions and otherwise throughout her 13<sup>th</sup> Cause of Action.

In the alternative, while the current operative pleadings have been amended as to the HICKS defendants (who have now answered the 3AC) under the Code of Civil Procedure, plaintiff FICO has not yet had the benefit of the perspectives and insight of this Honorable Court with respect to the sufficiency of her pleaded claims as to the recently names DOES who are now named defendants in this matter. As result, and while Plaintiff FICO contends that defendant ARIK AVANESZADEH should be directed to answer the 3AC, Plaintiff FICO respectfully requests in the alternative that she be afforded reasonable leave to

amend her 13<sup>th</sup> Cause of Action-for **Elder Abuse** as to defendant ARIK AVANESZADEH should this Honorable Court deem that any portions of this one claim are factually insufficient at this time.

DATED: April 16, 2014

Respectfully submitted,

LAW OFFICES

By:

Ian J. Imrich

Attorneys for Plaintiff, CARMEN EVELYN FICO

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